FILE COPY.

FILED
MAY 7 19[illegible]
JAMES R. BROWNING, Clerk

No. 843

In the Supreme Court of the United States

OCTOBER TERM, 1958

BIDART BROS., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
A. F. PRESCOTT,
LOUISE FOSTER,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute and regulations involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7

CITATIONS

Cases:

Albright v. *United States*, 173 F. 2d 339 5

Corn Products Co. v. *Commissioner*, 350 U.S. 46 ..... 4, 5

Watson v. *Commissioner*, 345 U.S. 544 4

Statutes and regulations:

Internal Revenue Code of 1939, Sec. 117(j) (26 U.S.C. 1952 ed., Sec. 117(j)) 1, 2, 3, 5, 6, 7–8

Internal Revenue Code of 1954, Sec. 1231(b)(4) (26 U.S.C. 1952 ed., Supp. V, Sec. 1231(b)(4) 6

Treasury Regulations 111, Sec. 29.117–7 ..... 5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 843

BIDART BROS., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 18–30) is reported at 157 F. Supp. 373. The opinion of the Court of Appeals (R. 42–47) is reported at 262 F. 2d 607.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1959. (R. 48.) A petition for rehearing was denied on February 17, 1959. (R. 49.) The petition for writ of certiorari was filed on April 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Section 117(j) of the Internal Revenue Code of 1939 provides that, upon the sale of "land" used in a

trade or business and an unharvested crop thereon, the profits on the sale of the crop may be taxed as capital gain rather than as ordinary income. The question presented is whether profits from the sale of growing crops which are sold in conjunction with a sale of the lease of the land constitute capital gains.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Sections 117(j)(1) (2) and (3) of the Internal Revenue Code of 1939 and Section 29.117-7(d) of Treasury Regulations 111 promulgated under the Code, are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

Petitioner contests the determination by the Commissioner of Internal Revenue that, under Section 117(j)(3) of the Internal Revenue Code of 1939, the profits which it realized upon the sale of unharvested crops, which it sold together with its leases of the land upon which the crops were growing, were taxable as ordinary income rather than as capital gain. The district court (R. 30) and a unanimous court of appeals (R. 47) upheld the Commission's ruling.

The facts as found by the district court are as follows (R. 31–34):

Taxpayer, a California corporation, was the lessee of several parcels of land upon which it grew a variety of crops such as hay, cotton and seed alfalfa. It had held the leased lands for a period in excess of six months when, during the fiscal year involved here, it sold its leases on such land together with the unharvested crops thereon (R. 31–32).

In its federal income tax return the taxpayer reported the sale of the leases and the unharvested crops as a single transaction and treated the entire profit from the sale as a long term capital gain. The gain on the leases amounted to $244,925.73 and on the unharvested crops to $237,954.56. The taxpayer also reported gain from harvested crops, which it treated as ordinary income (R. 32–33).

The Commissioner accepted the taxpayer's treatment of the gain on the leases, but held that the profit on the sale of the unharvested crops was ordinary income rather than capital gain. Accordingly, the Commission assessed a deficiency of $107,258.90, which the taxpayer paid. The taxpayer then filed a claim for refund, which was rejected by the Commissioner on February 4, 1957 (R. 32–34). Taxpayer then filed suit in the district court for refund.

ARGUMENT

Section 117(j) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 7–8) permits profits from the sale of certain property used in trade or business, including unharvested crops, to be taxed as capital gains rather than as ordinary income. With respect to unharvested crops, subsection 3, added to the Code by the Revenue Act of 1951 (65 Stat. 500), provides:

> (3) *Sale of land with unharvested crop.*—In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, *if the crop and the land are sold* or exchanged * * * *at the same time* and to the same person, the crop shall be considered as

"property used in the trade or business." [Italics supplied.]

We submit that the Court of Appeals correctly held that under these provisions petitioner could not treat as capital gains its profits on the sale of unharvested crops on land which it did not own, but merely leased.

The Act in plain terms permits the favored capital gains treatment only if the taxpayer sells both the land and the crops growing thereon. Since petitioner was merely a lessee, it could not sell the land which it did not own; it could only dispose of its limited interest in the land. It, therefore, did not come within the requirement of the Act that capital gains treatment may be had only "if the crop and the land are sold * * * at the same time."

In *Corn Products Co.* v. *Commissioner,* 350 U.S. 46, this Court, in holding that profits from hedging transactions are taxable under Section 117 as ordinary income and not as capital gains, pointed out (p. 52):

> Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term "capital assets" in § 117.

See, also, *Watson* v. *Commissioner,* 345 U.S. 544, 548, where the Court in holding that under a prior statutory provision profits from the sale of unharvested crops were taxable as ordinary income, pointed out that "in order for such income to be a capital gain, an affirmative statement by Congress was needed."

Neither the language nor the legislative history of the statute shows any "affirmative statement by Congress" that when it granted an "exception from the normal tax requirements of the Internal Revenue Code" (*Corn Products* case, *supra*) providing capital gains treatment for profits on the sale of unharvested crops which are sold at the same time as the "land," it also intended to extend this tax benefit to growing crops sold in conjunction with the sale of a leasehold interest.[1] On the contrary, as the Court of Appeals pointed out (Pet. App. iv), had Congress

> intended [the exception] to apply to crops on land, whether fee or leasehold, it would have been an easy thing to have said so. Or it could have granted the farmer capital gain treatment on all crops; or all unharvested crops, had this been its intention. But it enacted a law, not applicable to all unharvested crops sold, but only on unharvested crops on land held more than six months, and sold or exchanged at the same time and to the same person.

The holding below also is in accord with the administrative interpretation of these provisions by the Treasury Department. Section 29.117-7(d) of Treasury Regulations 111 (Appendix, *infra*, p. 8), specifically provides that a "leasehold or estate for years is not 'land' for the purpose of this section." Con-

[1] Petitioner's reliance (Pet. 15–16) on *Albright* v. *United States*, 173 F. 2d 339 (C.A. 8), is misplaced. That case merely stands for the proposition that all taxpayers who come within the provisions of Section 117(j) are entitled to its benefits. Here, however, petitioner does not come within its provisions, since it did not sell the "land" upon which the crops were growing.

gress presumably was aware of this interpretation when it reenacted Section 117(j)(3) without change as Section 1231(b)(4) of the 1954 Code.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
A. F. PRESCOTT,
LOUISE FOSTER,
Attorneys.

MAY 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) [as amended by Sec. 127(b), Revenue Act of 1943, c. 63, 58 Stat. 21, and Sec. 323(a)(1), Revenue Act of 1951, c. 521, 65 Stat. 452] *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *. Such term also includes timber * * * with respect to which subsection (k) (1) or (2) is applicable and unharvested crops to which paragraph (3) is applicable. * * *

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion * * * of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conver-

sions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *

(3) [as added by Sec. 323(a)(2), Revenue Act of 1951, *supra*] *Sale of land with unharvested crop.*—In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted as described in paragraph (2)) at the same time and to the same person, the crop shall be considered as "property used in the trade or business."

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.117–7 [as amended by T.D. 5970, 1953–1 Cum. Bull. 183, and T.D. 5980, 1953–1 Cum. Bull. 65]. *Gains and Losses From Involuntary Conversions and From the Sale or Exchange of Certain Property Used in the Trade or Business.*

* * * * * *

(d) *Unharvested crops.*—The conditions referred to in (a)(1)(v) above are: (1) the unharvested crop is on land which is "section 117(j) property", as defined in (a)(3) above, and such land has been held for more than six months; (2) such crop and such land are sold, exchanged, or converted at the same time and to the same person; and (3) no right or option is retained by the taxpayer, at the time of the sale, exchange, or conversion, to reacquire, directly or indirectly, the land (other than one customarily incident to a mortgage or other security transaction). The length of time for which the crop, as distinguished from the land, has been held is immaterial. A leasehold or estate for years is not "land" for the purpose of this section.

U.S. GOVERNMENT PRINTING OFFICE: 1959